

BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE
#17-1977 and UNFAIR LABOR PRACTICE #20-
1977.

MONTANA PUBLIC EMPLOYEES ASSOCIATION, INC.,

Complainant,

vs-

COUNCIL OF COMMISSIONERS/CHIEF EXECUTIVE
Butte/Silver Bow Government,

Defendant.

FINAL ORDER

A proposed Findings of Fact, Conclusions of Law and
Recommended Order was issued by Hearing Examiner, Mr. Barry
Smith, on September 6, 1977 in the above captioned matter.

Exceptions to that Proposed Order were filed by Complainant
on September 29, 1977 and by Defendant on September 28, 1977.

Oral argument was heard before the Board of Personnel
Appeals on October 21, 1977 and after reviewing the record and
considering the briefs and oral arguments, the Board makes the
following Order:

IT IS ORDERED that the Exceptions to the Hearing Examiner's
Proposed Findings of Fact, Conclusions of Law and Proposed Order
are denied.

IT IS ORDERED, that this Board adopts the Findings of Fact,
Conclusions of Law and Order issued by the Hearings Examiner on
September 6, 1977.

Dated this 1st day of November, 1977.

BOARD OF PERSONNEL APPEALS

By

Brent Cronley
Brent Cronley, Chairman

1 BEFORE THE BOARD OF PERSONNEL APPEALS
2 *****

3 IN THE MATTER OF UNFAIR LABOR PRACTICE #17, 1977,
4 AND UNFAIR LABOR PRACTICE #20, 1977:

5 MONTANA PUBLIC EMPLOYEES ASSOCIATION,)
6 INC.,

7 Complainant,

8 -vs-

9 COUNCIL OF COMMISSIONERS/CHIEF
10 EXECUTIVE--BUTTE/SILVER BOW
11 GOVERNMENT.

12 Defendant.

13 FINDINGS OF FACT,
14 CONCLUSIONS OF LAW,
15 AND RECOMMENDED ORDER

16 ULP #17, 20, 1977

17 *****

18 A hearing on the above-entitled matter was conducted on
19 August 4, 1977, at 10:00 a.m. in the Commission Chambers of the
20 Butte City Hall in Butte, Montana. The hearing was held pursuant
21 to the authority granted the Board of Personnel Appeals in
22 Section 59-1607(1), R.C.M. 1947.

23 Duly appointed hearing examiner was Barry Smith. Complainant
24 was represented at the hearing by counsel Barry Hjort, and
25 Defendant officials were represented by deputy county attorneys
26 John Mullany and Bob McCarthy.

27 Unfair Labor Practice case number 17 was filed by Complainant
28 against Defendant on June 23, 1977, alleging that Defendant
29 violated Section 59-1605(1) (c), R.C.M. 1947, by failing and
30 refusing to engage in collective bargaining negotiations with
31 Complainant, even though Complainant had made repeated requests
32 for a meeting date for negotiations over a period of some 60 days.
33 Defendant was served with the charge by the Board on June 30
34 and answered it on July 13, moving that the charge be dismissed.
35 The motion was denied by the Board.

36 Unfair Labor Practice case number 20 was filed July 7, 1977,
37 alleging that Defendant violated Section 59-1605(1) (c), R.C.M.
38 1947, by failing to bargain in good faith with Complainant, an

1 exclusive representative, in unilaterally denying deals to certain
2 employees covered under an existing contract between Complainant
3 and Defendant. Defendant was served with the charge on July 7,
4 and answered it on July 19, moving that the complaint be dis-
5 missed. This motion was also denied by the Board.

6 Defendant amended ULP #23 on July 22, alleging that Mario
7 Micone, Chief Executive of Butte/Silver Bow, has stated publicly
8 that he will negotiate with only one union and will not negotiate
9 with Complainant, in spite of its certified status, until certain
10 determinations are made as to which union will be the one with
11 which he will bargain; that the officials of Butte-Silver Bow
12 have decided by official vote that they will not negotiate with
13 Complainant until DC #12, 1977, is decided by this Board; and that
14 Defendant officials have sought to create a reason for their
15 failure to bargain by raising the false issue as to whether the
16 Chief Executive or the Council of Commissioners should represent
17 the public employer in collective bargaining. The amended charge
18 prayed for an interlocutory order to be issued from this Board
19 requiring the Defendant officials to enter into negotiations with
20 Complainant, with the final decision on the merits of the order
21 to be decided after the hearing. This request was based on the
22 hearing examiner's opinion in DC #12, 1977, in which it was said
23 on page 10 that the employer of the Butte/Silver Bow Sheriff's
24 Department is obligated to engage in collective bargaining
25 negotiations with Complainant and the American Federation of
26 State, County and Municipal Employees (AFSCME), since both
27 organizations had been certified by the Board to represent
28 certain units of law enforcement personnel and such certification
29 was still in force despite the decertification petition filed
30 by AFSCME. The request for the order was denied in view of
31 Defendant's answer that it has been faced with conflicting claims
32 by different unions as to the rights of representation of many of

1 its employees.

2 Complainant also filed a petition for declaratory ruling
3 adjudging the Butte-Silver Bow Council of Commissioners as the
4 public employer for collective bargaining purposes within the
5 meaning of Section 59-1609, R.C.M. 1947.

6 The following exhibits were entered into the record as
7 evidence at the hearing:

8 Complainant's Exhibit 1: Collective bargaining contract
9 between Complainant and Silver Bow County (effective July
10 1, 1975, to June 30, 1977).

11 Complainant's Exhibit 2: Letter from Cordell Brown, Chief
12 of Operations of Complainant association, to Pat Kenney,
13 Chairman of Silver Bow County Commissioners, written
14 April 28, 1977, notifying him of the intent to reopen the
15 contract and submit new proposals.

16 Complainant's Exhibit 3: Letter from Thomas Schneider,
17 Executive Director of Complainant association, to P. O.
18 Gustafson, Chairman of Butte/Silver Bow Council of Com-
19 missioners, written May 18, 1977, submitting Complainant's
20 contract proposals.

21 Complainant's Exhibit 4: Letter from Mario Niccone, Chief
22 Executive of Butte-Silver Bow, to Complainant, written
23 June 2, 1977, requesting all correspondence to be sent to
24 him.

25 Complainant's Exhibit 5: Committee of the Whole Report of
26 the council of Commissioners of July 20, 1977, recommending
27 "Communication No. 100" to Mr. Schneider to be held in
28 abeyance pending this Board's determination of the charges
29 considered therein.

30 Complainant's Exhibit 6: Minutes of the July 20, 1977, meet-
31 ing of the Council of Commissioners approving the Committee
32 of the Whole Report.

1 Complainant's Exhibit 7: Memo from Andrew Zankelberg,

2 Administrator of Silver Bow General Hospital, to all
3 hospital employees that free meals would be denied effective
4 July 1, 1977, to all not entitled to them by union contract.

5 Complainant's Exhibit 8: W-2 Form of Jeanette Miljies for
6 1976 showing a certain amount of income not taxed, testified
7 by her to represent compensation for meals

8 Complainant's Exhibit 9: W-2 Form of Jeanette Miljies for
9 1975 showing a certain amount of income not taxed, testified
10 by her to represent compensation for meals.

11 Complainant's Exhibit 10: W-2 Form of Phyllis Brasier for
12 1975 showing a certain amount of income not taxed, testified
13 by her to represent compensation for meals.

14 Complainant's Exhibit 11: W-2 Form of Phyllis Brasier for
15 1976 showing a certain amount of income not taxed, testified
16 by her to represent compensation for meals.

17 Complainant's Exhibit 12: Print-out payroll figures for
18 employees at Silver Bow General Hospital obtained for the
19 record by Dan Bukvich, Silver Bow Deputy Clerk of Court.

20 Defendant's Exhibit 1: Letter from Mr. Schneider to Mr.
21 Gustafson, dated June 27, 1977, requesting to be advised
22 as to Butte-Silver Bow's designated representative for
23 collective bargaining purposes.

24 Based on a thorough review of the entire record, including
25 exhibits as evidence and sworn testimony, the Hearing Examiner
26 makes the following:

27 FINDINGS OF FACT

28 1. The government of the former county of Silver Bow was
29 under a collective bargaining contract (Complainant's Exhibit 1)
30 with Complainant, effective from July 1, 1975, to June 30, 1977,
31 representing the benefits for some 60 county courthouse employees,
32 some 25 clerical employees at Silver Bow General Hospital, and

1 none 30 deputies of the former Sheriff's Department.

2 2. In accordance with the contract's "reopen" provision
3 requiring notice to reopen negotiations to be given to the
4 other party between 60 and 90 days before the contract's expir-
5 ation date, Gordell Brown, Chief of Operations of Complainant
6 association, wrote a letter on April 28, 1977 (Complainant's
7 Exhibit 2), to Pat Kenny, Chairman of the former Silver Bow
8 County Board of County Commissioners, notifying Mr. Kenny of
9 Complainant association's intent to submit new contract proposals.
10 The letter was sent shortly before the government of Silver Bow
11 County was to be consolidated with that of the City of Butte,
12 but it was made clear that the reason for this was the imminent
13 deadline for the submission of contract proposals. Complainant
14 received no response to this letter.

15 3. Thomas Schneider, Executive Director of Complainant
16 association, sent a cover letter (Complainant's Exhibit 3) on
17 May 18 to Francis Gustafson, Chairman of the new Butte/Silver
18 Bow Council of Commissioners, along with a package of proposals
19 for the new contract. Complainant received a letter from Mario
20 Mione, Chief Executive of Butte/Silver Bow, dated June 2, that
21 requested all correspondence to be sent to him. Mr. Schneider
22 testified he did not know whether this letter was response to
23 his letter of May 18.

24 4. Mr. Gustafson testified that he had no opinion as to who
25 should represent the public employer for collective bargaining
26 purposes.

27 5. Mr. Mione first became aware of the May 18 letter close
28 to the end of May, and that letter was probably his first notice
29 of Complainant's request to open negotiations. The April 28th
30 letter from Mr. Brown, announcing Complainant's intent to open
31 negotiations first came to him in a July budget review meeting.

32 6. Mr. Gustafson had not seen the May 18th letter addressed

1 to him before the hearing. Dan Bukvich, Deputy Clerk of Court
2 and President of the Butte local of Complainant association,
3 helped Mr. Schneider try to find Mr. Gustafson's address. Mr.
4 Bukvich said that although Mr. Gustafson was a well-known Butte
5 citizen and that he had known the man for many years, he knew
6 him only as "Gus" Gustafson and could not select the correct
7 Gustafson out of the listings in the phone book. Mr. Brown
8 delivered the May 18 letter, improperly addressed to the Butte
9 City Hall, and the accompanying package to Mr. Micone's secretary
10 at the courthouse approximately Friday, May 20. He had been told
11 by Mr. Schneider to deliver the package and letter to Mr.
12 Gustafson, and if that were not possible, to Mr. Micone. He
13 said he made it clear to Mr. Micone's secretary to deliver the
14 package and letter to either Mr. Micone or Mr. Gustafson that
15 day.

16 7. Mr. Gustafson characterized the days of transition from
17 the former city-county forms of government to the new charter form
18 as "extremely confusing." He said there was no communication
19 with the former Board of County Commissioners in the transition
20 period, and that the former Board's matters were handled as they
21 came up.

22 8. Mr. Schneider wrote a letter to Mr. Gustafson on June 27
23 (Defendant's Exhibit 1) informing him of complainant association's
24 desire to begin negotiations and requesting advice as to designated
25 representative of Defendant officials for collective bargaining
26 purposes. The letter said "other appropriate measures" would
27 be necessary if Mr. Gustafson did not promptly respond. Mr.
28 Gustafson said he received the letter, properly addressed to the
29 courthouse, about two days after it was mailed. ULP #17 was
30 filed June 29 and served by mail on Mr. Micone on June 30. Mr.
31 Gustafson said he did not remember whether the June 27 letter
32 reached him before he heard of the charge by Complainant.

1 9. Mr. Gustafson called Mr. Bukvich asking him about the
2 June 27 letter he had received from Mr. Schneider. Mr. Bukvich
3 told him that filing an unfair labor practice would not be a
4 personal action against Mr. Gustafson, but that it would be filed
5 to protect the interests of the members of MPEA. He testified
6 the main reason for filing the charge was to protect the organ-
7 ization from being decertified. Mr. Bukvich asked Mr. Schneider
8 to call Mr. Gustafson about the situation. In his subsequent
9 conversation with Mr. Gustafson, Mr. Schneider told him his intent
10 was not to go through with the unfair labor practice charge, but
11 rather to get to the bargaining table. He also told Mr. Gustafson
12 he didn't want the employees to have to work without a contract.
13 Mr. Gustafson told him that the matter would be placed in committee
14 by the commission.

15 10. The Council of Commissioners decided at its July 20
16 meeting to postpone making a decision on whether to bargain with
17 Complainant until the unfair labor practice charge is resolved.

18 11. AFSCME filed a decertification petition to decertify
19 Complainant's representation of the former Silver Bow Sheriff's
20 deputies, now working side by side with the former city police,
21 represented by AFSCME. Following a hearing on that matter June
22 7, Mr. Schneider had a conversation with Mr. Micone concerning
23 negotiations on a future contract. There is a conflict of
24 testimony as to the part of the conversation dealing with who
25 should be the bargaining representative for Defendant officials.
26 Donald Judge, AFSCME field representative, testified that he was
27 present at the conversation and that he heard Mr. Micone say he
28 should be the representative. Mr. Schneider answered, according
29 to Mr. Judge, that the law required the governing body to be
30 the representative and that he would not bargain with Mr. Micone
31 unless he were so designated by the Council of Commissioners.
32 Mr. Judge said he didn't recall Mr. Bukvich participating in the

1 conversation, although he was in the room at the time. Mr.
2 Bulvich testified that he remarked to Mr. Micone that he thought
3 the Council should be the representative, but that he did not
4 remember Mr. Schneider making a similar statement. He said Mr.
5 Judge may have joined the conversation after he left. Mr.
6 Schneider testified that there is "no way" he would have told
7 Mr. Micone that he would not negotiate with him. He said his
8 only concern is that the party with whom he negotiates is the
9 proper representative of the public employer, and that he has
10 been willing since the May 18 proposals to negotiate with any-
11 one who is the responsible party. Mr. Micone, since becoming
12 chief executive, has rendered agreements with two unions and
13 tentative agreements with four.

14 12. Mr. Brown met with Jackson Brown, former Administrator
15 of Silver Bow General Hospital, two or three times since April
16 concerning reports that free meals to employees at the hospital
17 were to be discontinued as a budgetary procedure. The admin-
18 istrator told him that it was pressure from the new government
19 that was making him consider the change, and that the decision
20 was mostly in the hands of the chief executive of the government.
21 Mr. Brown told him that he would be willing to negotiate on the
22 matter, but that in order to concede the discontinuance of the
23 meals, he would demand an increase in other benefits such as
24 salary. Mr. Brown told him that it would save some strife to
25 hold off on the policy change and negotiate on the issue. The
26 administrator said he would relate Mr. Brown's position to Mr.
27 Micone. Mr. Brown did not speak with Mr. Micone about the matter.
28 The decision to discontinue giving free meals to employees not
29 guaranteed such meals by union contract was announced June 28
30 and became effective July 1 (Complainant's Exhibit 7), the day
31 after the contract between Complainant and Silver Bow County
32 expired.

1 13. Jeanette Miljies, Activities Coordinator at Silver Bow
2 General Nursing Home, was told by the secretary of the hospital
3 administrator when she was employed eight years ago that she
4 would receive one free meal each working day in the cafeteria,
5 which she had received until July 1, 1977. When she worked at
6 St. James Community Hospital before working at the nursing
7 home she received higher wages, but felt that the free meals
8 were compensation for that. Ms. Miljies was involved in the
9 contract negotiation sessions in 1975, at which time the policy
10 of free meals was discussed. She said she did not believe it
11 necessary to include the meals policy in the contract as it was
12 verbally understood by the negotiators (including two or three
13 former county commissioners) that the policy was in effect. She
14 said she did not know that meals were mentioned in the contracts
15 of some of the other units. Complainant's Exhibits 8, 9, 10,
16 and 11 show that the meals were included as salary on the
17 employees' Wage and Tax Statement (Form W-2) under the heading
18 of "Total FICA wages."

19 14. Mr. Baykich testified, in reference to Complainant's
20 Exhibit 12, a print-out of the wages paid to hospital employees,
21 that the "meal earnings," a category on the print-out, showed
22 that employees were allowed 12 1/2 cents an hour compensation
23 for meals. This corresponds with the testimony of Andrew
24 Kankelberg, Acting Administrator of the hospital, that the
25 hospital charges \$1 a meal, considering an eight-hour shift.
26 Only one of the 15 employees on Complainant's Exhibit 12 is not
27 shown to be compensated 12 1/2 cents an hour for meals, and
28 that employee's meal compensation is shown to be nearly 12 cents
29 an hour.

30 15. Phyllis Brasier, operator and office admitting clerk
31 at Silver Bow General Hospital for the last 10 years, was told
32 by the hospital administrator's secretary when she was hired

1 that she would receive one free meal each day. She testified
2 that it has been a policy for more than 20 years. When the
3 discussion of salaries came up at the negotiations in 1975,
4 Ms. Brasier testified, the county commissioners at the negotiations
5 told the negotiators to remember that the employers were getting
6 one free meal a day.

7 DISCUSSION

8 The following three issues will be discussed separately as
9 the resolution of each issue does not appear to affect the
10 resolution of the others.

11 I. Who is the proper collective bargaining representative
12 of the Defendant officials?

13 II. Are Defendant officials guilty of a violation of Section
14 59-1605 (1) (e), R.C.M. 1947, in refusing to bargain collectively
15 in good faith with an exclusive representative?

16 III. Are Defendant officials guilty of a further unfair
17 labor practice by violating Section 59-1605 (1) (e) in terminating
18 the policy of free meals to employees of Silver Bow General
19 Hospital?

20 I.

21 Counsel for Complainant alleged in his petition for declaratory
22 ruling and in argument before the hearing examiner that Section
23 59-1609, R.C.M. 1947, is dispositive of the issue as to who
24 should represent the public employer in this instance for col-
25 lective bargaining purposes. That section says:

26 The chief executive officer of the state, the governing
27 body of a political subdivision, the commissioner of higher
28 education (whether elected or appointed) or the designate
29 authorized representative shall represent the public employer
in collective bargaining with an exclusive representative.
(Emphasis added.)

30 It was urged on behalf of Complainant that the emphasized language
31 indicates that the legislative intent is such that the Council of
32 Commissioners rather than the chief executive should be the bar-

1 bargaining agent for the public employer. Counsel asked the hearing
2 examiner to take administrative notice of the charter of the Butte-
3 Silver Bow government, which he contended shows the council to
4 be the governing body of the government and accordingly, pursuant
5 to Section 59-1609, the proper representative for collective bar-
6 gaining purposes.

7 Counsel for Defendant officials recognized that the former
8 county commissioners would be the bargaining agents under the
9 language of Section 59-1609, but they emphasized that the new
10 Council of Commissioners is unique. While the Board of County
11 Commissioners was a continuing legislative and executive body,
12 the Council of Commissioners is a legislative body meeting at
13 certain times (first and third Wednesdays of each month and each
14 previous Monday) rather than continuously, and the new chief
15 executive has the responsibility of administering the laws. Testi-
16 mony by Mr. Micono showed that all unions dealing with the
17 government send their correspondence to him (with the exception
18 of Complainant), and since becoming chief executive, Mr. Micono
19 has reached agreements with two unions and tentative agreements
20 with four (See Finding of Fact II).

21 Article III, Section 3.03 of the Butte-Silver Bow Charter
22 says, "The council of commissioners shall be the legislative and
23 policy determining body of the local government." Subsection (a)
24 says it has the power "to approve all contracts and claims."
25 Article IV, Section 4.02(a) says, "The executive and administrative
26 power of the new unit of local government is vested in the chief
27 executive." Subsection (b) says, "The chief executive shall:
28 1. enforce ordinances, resolutions and laws; . . . 3. administer
29 affairs of the local government; . . . 7. execute bonds, notes,
30 contracts and written obligations of the government, subject to
31 the approval of the council of commissioners (emphasis added)."

32 The quoted language of the charter indicates rather clearly

1 that the "governing body" of the government is the chief executive.
2 Although the council is clearly the policy-determining body, the
3 chief executive is given in Article IV, Section 4.02(a) and (b) 1
4 and 3 the responsibility of carrying out those policies. While
5 the council has the power of approving all contracts and claims,
6 the chief executive is given the responsibility of executing all
7 of the government's written obligations. Even though the word
8 "execute" may not include within its meaning the sense of the
9 word "negotiate," having the responsibility of executing contracts
10 implies certain powers and responsibilities, which may include
11 the powers and responsibilities of the party bound by those con-
12 tracts. After all, to be obligated to carry out a contract, one
13 must have a close legal connection to it. Those powers and
14 responsibilities would appear to make the chief executive the
15 governing body within the meaning of Section 59-1603 as the
16 party most close to the operation of a negotiated collective
17 bargaining contract and therefore most obligated to enter into
18 those negotiations. Even if this interpretation is not accepted,
19 however, it would appear that the chief executive has been con-
20 structively designated as the collective bargaining representative
21 in view of the several union contracts he has negotiated since
22 the new form of government became effective. Complainant, there-
23 fore should have no reservations as to the effectiveness of a
24 collective bargaining contract entered into pursuant to negotiations
25 with Mr. Milcone.

26 II.

27 Counsel for Complainant aptly described the situation in ULP
28 #17 when he said the charge filed is the unfortunate result of
29 the parties being unable to sufficiently refine their communication
30 to the extent of determining when and with whom the collective
31 bargaining negotiations should occur. Regardless of the influence
32 of poor communication on the conduct of the parties, however, the

1 determination in this matter must be based upon the objective
2 facts of the situation rather than on the subjective state of
3 mind of any of the parties.

4 Section 59-1605(1)(e), R.C.M. 1947 says:

5 It is an unfair labor practice for a public employer to:
6 (e) refuse to bargain collectively in good faith with an
exclusive representative.

7 Subsection (1) says:

8 For the purpose of this act, to bargain collectively is
9 the performance of the mutual obligation of the public
10 employer, or his designated representatives, and the rep-
11 resentatives of the exclusive representative to meet at
12 reasonable times and negotiate in good faith with respect
13 to wages, hours, fringe benefits, and other conditions of
employment, or the negotiation of an agreement, or any
question arising thereunder, and the execution of a written
contract incorporating any agreement reached. Such obligation
does not compel either party to agree to a proposal or
require the making of a concession.

14
15 Complainant asked at the close of its case in the hearing
16 and in its brief that the conduct of the Defendant officials be
17 found a per se violation of Section 59-1605(1)(e), which admits
18 of no excuse, and accordingly be ordered to begin negotiations
19 with Complainant as the certified exclusive representative for the
20 affected bargaining unit. The Hearing Examiner denied Complainant's
21 motions for directed verdict at the close of its case and
22 summary decision at the close of Defendant's case, which motions
23 were based on the contention that a prima facie case of per se
24 violations of Section 59-1605(1)(e) was established, because of
25 the several factors that have to be thoroughly considered in this
26 matter. Robert Gorman, in his text, Labor Law, said at page 400:

27 The per se violation is often said to be such either
28 because the respondent's conduct warrants an automatic
29 finding of illegality without the possibility of excuse, or
30 because the finding is based on "objective" criteria without
regard to the respondent's "subjective" state of mind, or
because the finding may be made in evidentiary isolation
without consideration of the record as a whole.

31 He also acknowledged, however, that applying a "per se" label
32 to certain conduct is not always a simple, mechanical task:

1 In spite of the comfort that comes from labeling conduct
2 unlawful per se, there is in truth no very sharp dividing line
3 between conduct unlawful per se and conduct unlawful only upon
4 the entire record and in all of the circumstances. Most of the
5 duty-to-bargain cases show the respondent may put forward in an
6 attempt to explain particular acts which on their face appear to
7 be per se unjustifiable. But beyond the frequency with which
8 they appear in the same record, there is no sharp analytical
9 dividing line between the per se violation and the circumstantial
10 violation.

11 With that in mind, the task at hand will be to analyze all the
12 circumstances to determine whether the public employer in this
13 instance was relieved from its obligation to meet at reasonable
14 times and negotiate in good faith with respect to the several
15 matters at issue in the contract between it and Complainant.

16 Defendant officials urged in their answer to the charge and
17 at the hearing that they have never refused to enter in negotiations
18 with Complainant. It was alleged in the answer that due to the
19 unification of the governments of Silver Bow County and the City
20 of Butte, employees represented by different unions have begun
21 working side-by-side in many instances and the new government has
22 accordingly been faced with "conflicting claims by different unions
23 as to the rights of representation of the employees within the
24 said departments." The answer further contended that Defendant
25 officials cannot enter into meaningful collective bargaining with
26 Complainant until the proper representative of Defendant officials
27 for collective bargaining purposes has been determined. In res-
28 ponse to Complainant's evidence as to how it opened negotiations
29 with Defendant officials, a further issue was raised at the hearing
30 as to the sufficiency of notice to Defendant officials by Com-
31 plainant concerning its intent to open those negotiations. These
32 issues had to be considered at the hearing and have to be considered
33 in this opinion, in spite of how clear a case Complainant may have
34 presented.

35 Regardless of the ambiguity of who should represent the public
36 employer for collective bargaining purposes, an ambiguity emphasized

1 by Mr. Schneider and conceded to by Mr. Micone, the facts show
2 that this cannot be justification for putting off negotiations.
3 Mr. Micone learned of Complainant's intent to open negotiations
4 near the end of May (Finding of Fact 3), and Mr. Gustafson learned
5 of that intent no later than the end of June (Finding of Fact 8).
6 There is no evidence of any disagreement between the chief
7 executive and the Council of Commissioners concerning who should
8 be the bargaining representative (Mr. Gustafson testified that
9 he had no opinion as to who should be the representative--see
10 Finding of Fact 4), so the Defendant officials could have agreed
11 among themselves as to the proper designated representative.

12 The notification to Mr. Gustafson by Mr. Schneider of Com-
13 plainant's intent to bargain was not weakened by the fact that
14 the unfair labor practice charge was soon filed (see Finding of
15 Fact 8). Although the timing of filing the charge may be question-
16 able, Mr. Schneider did talk to Mr. Gustafson and tell him that
17 the main purpose was to get negotiations under way (Finding of
18 Fact 9).

19 Counsel for Complainant cited the case of DC #12, 1977, of
20 this Board in which the hearing examiner determined that even
21 though there was such a significant change in the bargaining
22 units of the former Butte City Police and Silver Bow County
23 Sheriff's Department when the two groups of law enforcement
24 personnel began working side by side that would allow a new unit
25 determination election, the currently certified bargaining rep-
26 resentatives must continue to be recognized by the employer
27 (page 10 of the opinion) until a new determination is made.
28 Defendant officials have referred to the existence of different
29 unions for the same groups of employees as "conflicting claims
30 by different unions as to the rights of representation of the
31 employees" (see answer to the charge).

32 Mr. Micone testified that this has had an adverse effect on

1 employee morale. He said that as a result of the unification,
2 there are employees doing exactly the same work who receive
3 entirely different sets of benefits because of the different
4 Union contracts under which they worked in the previous city
5 and county governments. On cross examination at the hearing,
6 he was asked about Mr. Schneider's offer to him to negotiate
7 only for the employees not working side by side with employees
8 covered by another union (such as the former county sheriff's
9 deputies, represented by MPEA, who work with the former city
10 police, represented by AFSCME) or to negotiate only a six-month
11 contract for the MPEA employees working side by side with AFSCME
12 employees (the AFSCME-represented law enforcement personnel work
13 under a contract expiring December 31, six months after the
14 expiration of Complainant's contract).

15 Mr. Milone described his reaction to this proposal: "We
16 are still dealing with two units for the same employees, which,
17 to repeat myself, is not good for the government or good for
18 the employee." He further said that he did not regard Mr.
19 Schneider's offer as an official one, but rather as an "off-the-
20 cuff" statement: "He did not say, 'This is what we want to pro-
21 ceed on.' It's, 'What do you think about doing something like
22 this.' I don't know. But our position is that we would still
23 like to have one bargaining unit. And the determination had not
24 been made at that time regarding AFSCME and MPEA."

25 It must certainly be true that it is not good for employee
26 morale to have the same group of employees working under two sets
27 of benefits, but it is also not good for employee morale for
28 employees to be working without a contract and for the employer
29 to have the power to decide when bargaining units are no longer
30 valid. The claims of Complainant as to representation of certain
31 Butte-Silver Bow employees, furthermore, were not shown to be
32 "conflicting" with those of other unions, as alleged in the

1 answer, but only conflicting perhaps in the sense that other
2 unions rightly claimed to represent other employees doing the
3 same work.

4 Mr. Schneider's proposal to negotiate either without considering
5 the employees working side by side with those represented by
6 other unions or negotiating short-term contracts with them to
7 correspond to the expiration dates of the contracts covering the
8 employees with whom they work shows a good faith effort to
9 alleviate any problems encountered by Butte-Silver Bow in the
10 combining of certain functions of employees of the former city
11 and county governments. It is true that those proposals will
12 not eliminate the occurrence of two units for the same group of
13 employees, but it could help make the transition toward that
14 situation occur more smoothly if this Board decides to allow
15 new unit determinations for those employee groups, as recommended
16 by the hearing examiner in DC #12. (The Board will not be con-
17 sidering that recommended order until its September 23 meeting.)

18 Counsel for Defendant officials allege in their brief that
19 filing an unfair labor practice charge to protect its position
20 as bargaining agent is not sufficient reason for a labor union
21 to file such a charge (see Finding of Fact 9). Counsel for
22 Complainant, on the other hand, remarks in his brief that the
23 decision of Defendant officials to postpone bargaining until this
24 unfair labor practice charge has been resolved (see Finding of
25 Fact 10) amounts to an "absurd" defense.

26 It should be reiterated here that the concern of the hearing
27 examiner is not with the propriety of Complainant's motives in
28 filing the charge, regardless of whether there may be some ir-
29 regularity in the circumstances surrounding the filing of that
30 charge. The concern here is with the objective basis for the
31 charge. Even though Defendant officials, in raising the issues
32 allegedly precluding their duty to bargain at this time, may

1 not have explicitly refused to bargain with this union there have
2 been delays and such delays were not adequately defended by the
3 evidence in the hearing. Such delay, therefore, amounts to a
4 constructive refusal to bargain and is accordingly a violation
5 of Section 59-1605(1)(e).

6 III.

7 The testimony at the hearing clearly established that the
8 providing of free meals to employees of Silver Bow General
9 Hospital was long established as a part of the employees' com-
10 pensation. Evidence and testimony showed the meals to be
11 included on employees' Wage and Tax Statements the hospital
12 payroll records, and was treated as compensation by the employer
13 (see Findings of Fact 13, 14, and 15). Andrew Kankelborg, acting
14 Administrator at the hospital, conceded at the time that he
15 might have to reconsider his position on withdrawing meals based
16 on the evidence presented at the hearing.

17 Counsel for Defendant officials contend in their brief, however,
18 that filing an unfair labor practice is not the proper course
19 of action for Complainant to take in view of the grievance pro-
20 cedure in the contract between it and Silver Bow County.
21 Appendix 1 of the contract says an aggrieved employee may file
22 a grievance within 15 days of the origin of the problem and
23 follow a series of procedures leading up to a request of binding
24 arbitration. Defendants contend that Appendix 1 provided a
25 sufficient manner of settling the problem.

26 Mr. Brown testified that a grievance was not filed by the
27 union because of the discontinuance of the meals policy at the
28 expiration of the contract. He said no grievance was filed
29 earlier because there was nothing about which to be aggrieved--
30 until July 1, there had been only reports that free meals might
31 be stopped; there had been no official action taken by the
32 employer. He testified that he was sure several grievances would

1 have been filed if the discontinuance had occurred earlier, such
2 as in April. Having problems in getting to the bargaining
3 table also influenced the decision to file unfair labor practice
4 charges rather than follow the contractual grievance procedure.

5 Section 8(a)(5) of the National Labor Relations Act (NLRA)
6 is the parent of statute of Section 59-1605(1)(e), R.C.M. 1947,
7 and Section 8(d) is the parent of Section 59-1605(3), making
8 interpretations of those sections by the courts and the National
9 Labor Relations Board (NLRB) influential in this decision.

10 Complainant's brief cites Chase Manufacturing, Inc., 200 NLRB
11 No. 128, 82 LRRM 1026 (1972), in support of its contention that
12 a grievance procedure is not mandated by the contract. That
13 case was concerned with a unilateral reduction of employees'
14 wages below that specified in the contract. The NLRB said at
15 82 LRRM 1027, 1028:

16 Respondent argues that said conduct merely involves a breach
17 of contract best resolved in a grievance-arbitration pro-
18 ceeding. We find no merit in Respondent's position, for as
19 the facts fully demonstrate, the wage reductions were part
20 and parcel of an unlawful course of conduct whereby Respondent
21 intended to rid itself of the established bargaining relation-
22 ship and its attendant obligations of which the contract wage
23 rates were but a part. Consequently, the issue before us is
24 not limited to the propriety of remedying a breach of contract,
25 but rather one that concerns Respondent's complete rejection
26 of the principles of collective bargaining, and the self-
27 organizational rights of employees. Accordingly, and in this
28 context, we find that the unilateral cuts in wages of (certain
29 employees) here violated Section 8(a)(5) of the Act.

30 Adopting this interpretation, it is irrelevant that the policy
31 of free meals was not specifically included in the collective
32 bargaining contract since all parties understood the meals to be
33 part of the employees' compensation (see Findings of Fact 13, 14,
34 and 15). Eliminating the free meals shows a disregard of the
35 "established bargaining relationship and its attendant obligations"
36 just as much as if the meal policy were spelled out in writing.
37 The employer cannot be heard to complain of the lack of protest
38 by the union by means other than an unfair labor practice charge

1 when Mr. Brown made a seemingly good faith effort to take care
2 of the problem before it ever arose (see Finding of Fact 12).

3 Finding that the free meals were dropped in good faith will
4 not influence this decision. The court said in NLRB v. Katz,
5 369 U.S. 736, 50 LHRM 2177 (1962):

6 Unilateral action by an employer without prior discussion
7 with the union does amount to a refusal to negotiate about
8 the affected conditions of employment under negotiation,
9 and must of necessity obstruct bargaining, contrary to the
10 congressional policy. It will often disclose an unwilling-
11 ness to agree with the union. It will rarely be justified
12 by any reason of substance. It follows that the Board may
13 hold such unilateral action to be an unfair labor practice
14 in violation of § 8(a)(5), without also finding the employer
15 guilty of over-all subjective bad faith.

16 See also NLRB v. Central Illinois Public Service Co., 54 LHRM
17 2586 (7th Cir. 1963).

18 In Abingdon Nursing Center, 80 LHRM 1470 (1972), the employer
19 was found guilty of a Section 8(a)(5) violation for changing the
20 hours of work of certain employees and terminating its practice
21 of providing free hot lunches and was accordingly ordered to
22 upon request, bargain with the union, reinstate the former hours
23 of work and make whole employees for any loss of pay caused by
24 the change, and reinstate the program of hot lunches. The order
25 of the NLRB to the employer to reimburse employees for losses
26 incurred due to the employer's discontinuance of a gas discount
27 was upheld in NLRB v. Central Illinois Public Service Co.,
28 above, based upon an interpretation of Section 10(e) of the
29 NLRA, the parent statute of Section 59-1607(2), R.C.M. 1947.
30 Both sections direct the Board, upon finding an unfair labor
31 practice, to "take such affirmative action including reinstatement
32 of employees with or without back pay, as will effectuate the
33 policies" of the respective act.

34 As the free meals had been a part of the employees' compen-
35 sation for many years (see Findings of Fact 13 and 15), the
36 employees can be made whole only by the employer reimbursing

1 then \$1 for each day worked since July 1, \$1 being the price
2 the hospital charges for meals (see Finding of Fact 14).

3 CONCLUSIONS OF LAW

4 1. The chief executive of Butte-Silver Bow is the proper
5 bargaining representative for the public employer of Butte-
6 Silver Bow employees.

7 2. The failure of Defendant officials to bargain with Com-
8 plainant constitutes a violation of Section 59-1605(1)(e), R.C.M.
9 1947.

10 3. Discontinuing the policy of free meals to employees at
11 Silver Bow General Hospital constitutes a violation of Section
12 59-1605(1)(e), R.C.M. 1947.

13 RECOMMENDED ORDER

14 It is hereby ordered that Defendant officials engage in
15 collective bargaining negotiations with Complainant upon request,
16 that the policy of the meals for employees at Silver Bow General
17 Hospital be reinstated, and that those employees denied the meals
18 by the discontinuance be reimbursed \$1 for each day they would
19 otherwise have received a free meal.

20 Dated this 6th day of September, 1977.

21
22 BOARD OF PERSONNEL APPEALS

23
24 BY Barry L. Smith
25 Barry L. Smith
26 Hearing Examiner
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